

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RUSSELL E. FOLK, Petitioner	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
JOHN M. McCULLOUGH, et al., Respondents	:	02-CV-4745

**RESPONSE TO PETITIONER'S OBJECTIONS TO REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE**

MARK C. BALDWIN, District Attorney of Berks County, Pennsylvania, by KELLY S. KLINE, Assistant District Attorney, on behalf of the Respondent, respectfully requests that this Court adopt the Report and Recommendation of the Magistrate Judge and deny this Petition for Writ of Habeas Corpus and in support of that request, states:

1. As the Respondent, the Commonwealth has dispensed with a seriatim answer for the sake of clarity.

2. On October 15, 1997, an Information filed criminal action No. 3310/97 charged petitioner, Russell E. Folk, with Rape, Involuntary Deviate Sexual Intercourse, Sexual Assault, Aggravated Indecent Assault, Indecent Assault, Endangering the Welfare of a Child, and Corruption of Minors.¹

3. On May 6, 1998, a jury convicted petitioner of all charges.

4. The Honorable Stephen B. Lieberman sentenced petitioner to an aggregate term of six to thirty years incarceration on June 26, 1998. Following imposition of sentence, the trial court granted trial counsel's request to withdraw.

¹ 18 Pa. C.S.A. §§ 3121(a)(1), (a)(6), 3123(a)(1), (a)(6), 3124.1, 3125(a)(1), (a)(7), (a)(8), 3126(a)(1), (a)(7), 4304, and 6301, respectively.

5. On July 27, 1998, petitioner through his new counsel, filed a notice of appeal to the Superior Court of Pennsylvania. In *Commonwealth v. Folk*, 1159 HBG 1998, dated July 9, 1999, the Superior Court of Pennsylvania affirmed the judgment of sentence.

6. On or about April 5, 2000, petitioner filed a *pro se* petition under the Post Conviction Relief Act. The PCRA court appointed Gail Chiodo, Esquire, to assist petitioner in his quest for relief.

7. On August 1, 2000, Attorney Chiodo filed a *Finley* Petition to support her request to withdraw as counsel for petitioner. On August 31, 2000, Judge Lieberman allowed Attorney Chiodo to withdraw and filed a Notice of Intent to Dismiss the petition without a hearing. On September 26, 2000, Judge Lieberman dismissed petitioner's Post Conviction Relief Act petition.

8. On October 24, 2000, petitioner filed a *pro se* appeal to the Superior Court of Pennsylvania challenging the order dismissing his petition under the Post Conviction Relief Act. In *Commonwealth v. Folk*, 1916 MDA 00, dated November 21, 2001, the Superior Court of Pennsylvania affirmed the PCRA court's dismissal of the Post Conviction Relief Act petition.

9. On July 10, 2002, the Supreme Court of Pennsylvania denied petitioner's request for allowance of appeal.

10. On August 19, 2002, Petitioner filed this Petition for Writ of Habeas Corpus and raised numerous grounds for relief, not only of trial court error but also of ineffective assistance of counsel.

11. On October 25, 2002, Respondent filed an Answer to Petitioner's Request for Relief asserting that the first three issues had not been exhausted in the state courts, thereby precluding federal habeas corpus review. Respondent also asserted that the ninth issue had been

procedurally defaulted, thereby precluding federal habeas corpus review. Finally, Respondent asserted that the remaining claims were without merit.

12. On November 19, 2002, United States Magistrate Judge Charles B. Smith filed a Report and Recommendation recommending that the petition be DENIED and DISMISSED with prejudice.

13. On or about November 30, 2002, petitioner filed Objections to Report and Recommendation of the United States Magistrate Judge. This document does not present any new arguments or any additional basis for granting relief. The Objection attempts to again blame appellate counsel for failure to appeal to the Supreme Court of Pennsylvania during direct appeal, however, the Report and Recommendation addresses the fact that lack of counsel does not meet the cause and prejudice standard. In addition, petitioner merely reiterates his numerous allegations regarding an alibi defense.

14. The Commonwealth hereby incorporates the previously filed Answer to Petition for Writ of Habeas Corpus and Memorandum of Law filed in support of the Answer.

15. The Commonwealth further supports the Report and Recommendation filed by the United States Magistrate Judge Charles B. Smith.

WHEREFORE, for the foregoing reasons, the Commonwealth, as the Respondent, respectfully requests that this Court dismiss the Petition for Writ of Habeas Corpus without a hearing.

Respectfully submitted,

KELLY S. KLINE
Assistant District Attorney
Berks County, Pennsylvania

